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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

JOAQUIN A. RODRIGUEZ TORRES,  
 CORNELIA M. STEUBE,

Plaintiffs,

v.

GERARD HEINAUER, Director, U.S.  
 Citizenship and Immigration Services,  
 Nebraska Service Center;  
 DR. EMILIO T. GONZALEZ, Director, U.S.  
 Citizenship and Immigration Services;  
 MICHAEL CHERTOFF, Secretary of the U.S.  
 Department of Homeland Security;  
 ROBERT MUELLER, Director,  
 Federal Bureau of Investigations;  
 MICHAEL MUKASEY, Attorney General,  
 U.S. Department of Justice,

Defendants.

No. C 07-3345 TEH

DEFENDANTS' CROSS-MOTION FOR  
 SUMMARY JUDGMENT; and  
 DECLARATION OF F. GERARD  
 HEINAUER and DECLARATION OF  
 MICHAEL A. CANNON

Date: January 7, 2008  
 Time: 10:00 a.m.  
 Courtroom: 12, 19<sup>th</sup> Floor

**I. INTRODUCTION**

Plaintiffs Joaquin Rodriguez Torres and Cornelia Steube ask this Court to issue a writ of mandamus, compelling Defendants to make a determination on their applications for adjustment of status. They also ask the Court to find that Defendants have violated the Administrative Procedure Act ("APA"), and to grant relief under the Declaratory Judgment Act. Plaintiffs' claims must fail. Plaintiffs' applications remain pending because their name check are not yet complete. The facts

1 are undisputed, and Defendants are entitled to judgment as a matter of law. Accordingly,  
2 Defendants respectfully ask this Court to grant their motion for summary judgment.

## 3 II. BACKGROUND

4 On June 14, 2004, Plaintiffs Joaquin Rodriguez Torres and Cornelia Steube filed an I-485  
5 application to adjust their status to that of a lawful permanent resident (LPR) with the California  
6 Service Center. See Declaration of F. Gerard Heinauer (Heinauer Decl.) ¶ 3 (attached as Exhibit  
7 A). Plaintiffs' applications were transferred to the Nebraska Service Center on March 8, 2007 for  
8 completion for the applications. *Id.* A background security name check request was submitted to  
9 the FBI by USICS, and received by the FBI on June 29, 2004. See Declaration of Michael A.  
10 Cannon (Cannon Decl.) ¶ 39 - 40 (attached as Exhibit C). Plaintiff Joaquin Rodriguez Torres'  
11 application is ready to be adjudicated except for his pending background and security check.  
12 Heinauer Decl. ¶ 7. Plaintiff Cornelia Steube's name check was completed on November 17,  
13 2004, however, as a derivative spouse, her application cannot be adjudicated until the principal  
14 application has been completed. Heinauer Decl. ¶ 16. Plaintiff filed the instant Complaint on  
15 June 26, 2007.

## 16 III. GENERAL PRINCIPLES APPLICABLE TO THIS MOTION

### 17 A. LEGAL STANDARD

18 Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories,  
19 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to  
20 any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ.  
21 P. 56(c). An issue is genuine only if there is sufficient evidence for a reasonable fact finder to find  
22 for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A fact  
23 is material if the fact may affect the outcome of the case. See id. at 248. The Ninth Circuit has  
24 declared that "[i]n considering a motion for summary judgment, the court may not weigh the evidence  
25 or make credibility determinations, and is required to draw all inferences in a light most favorable to  
26 the non-moving party." Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997). A principal purpose  
27 of the summary judgment procedure is to identify and dispose of factually unsupported claims. See  
28 Celotex Corp. v. Cattrett, 477 U.S. 317, 323-24 (1986).

1     B. ADJUSTMENT OF STATUS

2     Section 245 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1255, authorizes  
3     the Secretary of the Department of Homeland Security (“Secretary”)<sup>1</sup> to adjust to permanent residence  
4     status certain aliens who have been admitted into the United States. Adjustment of status is  
5     committed to the Secretary’s discretion as a matter of law. Section 1255(a) expressly provides:

6             The status of an alien who was inspected and admitted or paroled into the United  
7             States . . . may be adjusted by the [Secretary], in his discretion and under such  
8             regulations as he may prescribe, to that of an alien lawfully admitted for  
9             permanent residence[.]

8     8 U.S.C. 1255(a) (emphasis added). Significantly, the statute does not set forth any time frame in  
9     which a determination must be made on an application to adjust status. In addition, the regulations  
10    setting forth the procedures for aliens to apply to adjust status do not set forth a time frame for  
11    adjudication, and allow discretion in how to conduct the adjudication. See 8 C.F.R. § 245 et seq.

12    Before a decision is rendered on an alien’s application to adjust status, U.S. Citizenship and  
13    Immigration Services (“USCIS”) conducts several forms of security and background checks to ensure  
14    that the alien is eligible for the benefit sought and that he is not a risk to national security or public  
15    safety. See Heinauer Decl. ¶ 9. USCIS also conducts investigations into the bona fides of petitions  
16    and applications that have been filed, in order to maintain the integrity of the application process and  
17    to ensure that there is no fraud in the application process. See 8 U.S.C. § 1105(a) (authorizing “direct  
18    and continuous liaison with the Directors of the Federal Bureau of Investigation [(“FBI”)] and the  
19    Central Intelligence Agency and with other internal security officers of the Government for the purpose  
20    of obtaining and exchanging information for use in enforcing the provisions of this chapter in the  
21    interest of the internal and border security of the United States”). These checks currently include  
22    extensive checks of various law enforcement databases, including the FBI. See Heinauer Decl. ¶ 9.

23    The FBI’s name check process is quite complex. See Eldeeb v. Chertoff, et al., No. 07-cv-236-T,  
24    2007 WL 2209231, at \*4 (M.D. Fla. July 30, 2007). Name checks are performed at the request of a

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26             <sup>1</sup> On March 1, 2003, the Department of Homeland Security and its United States  
27             Citizenship and Immigration Services assumed responsibility for the adjustment program. 6  
28             U.S.C. § 271(b). Accordingly, the discretion formerly vested in the Attorney General is now  
              vested in the Secretary of Homeland Security. 6 U.S.C. § 551(d).

1 variety of organizations, including the federal judiciary, friendly foreign police and intelligence  
2 agencies, and state and local governments. Id. at \*3. When the FBI conducts a name check, the name  
3 is checked against the FBI's Universal Index, in a four-stage process. Id. at \*3. Generally, the FBI  
4 employs a first-in, first-served protocol. Id. at \*4. However, when an applicant's name check requires  
5 a review of numerous FBI records and files, the name check may require additional time until all  
6 responsive records are located and reviewed. Id. USCIS determines which name checks are to be  
7 expedited. See USCIS Clarifies Criteria to Expedite FBI Name Check (attached as Exhibit B). An  
8 expedited name check proceeds to the front of the queue, in front of others awaiting processing.  
9 Eldeeb, 2007 WL 2209231, at \*5.

10 The FBI processed more than 3.4 million name checks during fiscal year 2006. Id. at \*3. The FBI  
11 is working as expeditiously as possible to reduce the small percentage of immigration name checks for  
12 which a backlog exists. This backlog results from the vast number of requests the FBI receives from  
13 USCIS and other customers, as well as the requirement for enhanced security measures existing since  
14 September 11, 2001. Id. at \*5. A variety of factors play into processing times, including "hits,"  
15 common names, and expedited name checks. Id. at \*4.

16 C. RELIEF AVAILABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT  
17 AND THE MANDAMUS ACT

18 Judicial review under the APA, 5 U.S.C. § 701, et seq., is specifically precluded where "agency  
19 action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Agency action, as defined  
20 under the APA, also includes "a failure to act." 5 U.S.C. § 551(13). Under 5 U.S.C. § 706(1), a court  
21 may compel "agency action unlawfully withheld or unreasonably delayed." The elements of a claim  
22 under § 706(1) are the existence of a discrete, ministerial duty; a delay in carrying out that duty; and  
23 a determination that the delay was unlawful or unreasonable in light of prejudice to one of the parties.  
24 Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004); Rockbridge v. Lincoln, 449 F.2d  
25 567, 569-73 (9th Cir. 1971).

26 The APA does not provide an independent jurisdictional basis. Califano v. Sanders, 430 U.S. 99,  
27 107 (1977); Staacke v. U.S. Department of Labor, 841 F.2d 278, 282 (9th Cir. 1988). Rather, it merely  
28 provides the standards for reviewing agency action once jurisdiction is otherwise established. Staacke,

841 F.2d at 282. Similarly, the Declaratory Judgment Act, 28 U.S.C. § 2201 (“DJA”), does not provide an independent basis for jurisdiction; rather, it only expands the range of remedies available in federal courts. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950).

Mandamus is an extraordinary remedy. See Cheney v. United States District Court for the District of Columbia, 542 U.S. 367, 392 (2004) (Stevens, J., concurring); Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980). The United States Supreme Court has stated that “[t]he common law writ of mandamus is intended to provide a remedy for a plaintiff only if . . . the defendant owes him a clear nondiscretionary duty.” Heckler v. Ringer, 466 U.S. 602, 616 (1984). The Ninth Circuit has explained that

[m]andamus . . . is available to compel a federal official to perform a duty only if: (1) the individual’s claim is clear and certain; (2) the official’s duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available. Kildare v. Saenz, 325 F.3d 1078, 1084 (9th Cir. 2003). Thus, “‘mandamus does not lie to review the discretionary acts of officials.’” See Nova Stylings Inc. v. Ladd, 695 F.2d 1179, 1180 (9th Cir. 1983), quoting Nelson v. Kleppe, 457 F. Supp. 5, 8 (D. Idaho 1976).

#### IV. ANALYSIS

##### A. ALL DEFENDANTS EXCEPT CHERTOFF SHOULD BE DISMISSED

Courts in this District have recognized that since March 1, 2003, the Department of Homeland Security has been the agency responsible for implementing the Immigration and Nationality Act. See 6 U.S.C. §§ 271(b)(5), 557. Accordingly, Defendants Gerard Heinauer, Emilio T. Gonzalez, Robert S. Mueller and Michael Mukasey should be dismissed. See Clayton v. Chertoff, et al., No. 07-cv-02781-CW, slip. op., at 13 (N.D. Cal. Oct 1, 2007); Konchitsky v. Chertoff, No. C-07-00294 RMW, 2007 WL 2070325, at \*6 (N.D. Cal. July 13, 2007); Dmitriev v. Chertoff, No. C 06-7677 JW, 2007 WL 1319533, at \*4 (N.D. Cal. May 4, 2007).

##### B. RELIEF IS NOT AVAILABLE UNDER THE APA

###### 1. Compelling Action By USCIS Would Necessarily Interfere With the FBI’s Discretion

Numerous courts have recognized the FBI’s discretion “in determining the timing for conducting the many name check requests that it receives and the manner in which to conduct those checks.” Yan



1 v. Mueller, No. H-07-0313, 2007 WL 1521732, at \*6 (S.D. Tex. May 24, 2007); see also Takkallapalli  
 2 v. Chertoff, 487 F. Supp. 2d 1094, 1099 (W.D. Mo. 2007) (stating that where delay was due to  
 3 incomplete name check, “Defendants’ conduct [was] sufficient to avoid judicial intervention.”); Li v.  
 4 Chertoff, 482 F. Supp. 2d 1172, 1179 (S.D. Cal. 2007) (recognizing that USCIS has wide discretion  
 5 “in matters pertaining to the pace of the adjudication of I-485 applications.”); Sozanski v. Chertoff,  
 6 et al., No. 06-CV-0993 N, 2006 WL 4516968, at \*1 (N.D. Tex. Dec. 11, 2006) (holding that federal  
 7 district courts lack jurisdiction to compel the FBI to perform name checks in adjustment of status  
 8 cases). Compelling USCIS to process Plaintiffs’ applications in a certain time frame would amount  
 9 to compelling the FBI to exercise its discretion in a certain manner. Accordingly, Plaintiffs essentially  
 10 seek to compel a discretionary action, and relief is unavailable under the APA.

## 11 2. The Delay is Reasonable

12 Even if the actions at issue were not discretionary, Plaintiffs have failed to show that the delay at issue  
 13 here is unreasonable. To determine whether the delay is egregious, such that relief under the APA is  
 14 warranted, several circuits have adopted the six-part test first articulated in Telecomm. Research and  
 15 Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (“TRAC”).

### 16 a. A Rule of Reason Governs the Agency Decisions at Issue

17 The first TRAC factor requires an agency to govern decisions with a rule of reason. TRAC, 750  
 18 F.2d at 80. Given the large volume of petitions and applications requiring adjudication, the extensive  
 19 background check that is required for national security and public safety, and the limited resources  
 20 available to it, the FBI is proceeding in an orderly fashion with the completion of name checks in the  
 21 order in which they are received. See Eldeeb v. Chertoff, No. 07cv236-T-17EAJ, 2007 WL 2209231,  
 22 at \*2 (M.D. Fla. July 30, 2007). Requests are processed through two initial checks by a first-in, first-  
 23 served protocol. Cannon Decl. ¶ 18. Exceptions to the general rule of first-in, first-served processing  
 24 generally are made only when USCIS requests the FBI to expedite a particular case. *Id.* USCIS has  
 25 a policy of expediting cases in certain compelling circumstances to include military deployment, age-  
 26 out cases, critical medical conditions, and loss of Social Security or other benefits. See Exhibit B.  
 27 Expedited service allows name check customers to allocate their fees toward their agency’s highest  
 28 priorities. Additionally, this exception to the first-in, first-served rule provides the FBI and USCIS

1 a way to minimize possible health and welfare harm to applicants that may arise while an application  
2 is pending.

3 Once the FBI name check for Plaintiff Rodriguez Torres has been completed, USCIS will promptly  
4 adjudicate Plaintiffs' applications. Further, USCIS regularly monitors the case to determine whether  
5 the name check remains pending. Heinauer Decl. ¶ 19. Public safety requires USCIS to make certain  
6 that the background checks have been completed and any outstanding issues resolved before it reaches  
7 a decision.

8 In Plaintiffs' case, this means that USCIS must await the results of the FBI name check before  
9 reaching a decision on Plaintiffs' applications, and the FBI must be given time to perform an accurate  
10 and thorough check. Heinauer Decl. ¶ 11. Moreover, the FBI's "first in, first out" processing approach  
11 is a method that is "deserving of deference." Liberty Fund, Inc. v. Chao, 394 F. Supp. 2d 105, 118  
12 (D.D.C. 2005); see also In re Barr Lab. Inc., 930 F.2d 72, 76 (D.C. Cir. 1991) ("The agency is in a  
13 unique and authoritative position to view its projects as a whole, estimate the prospects for each, and  
14 allocate its resources in the optimal way.").

15 b. There Is No Congressionally Mandated Timetable

16 The second TRAC factor does not apply to the present case because there is neither a statutory  
17 requirement that the FBI process the name check nor one requiring USCIS to adjudicate the application  
18 within a certain amount of time. Contra Intelligence Reform and Terrorism Prevention Act of 2004,  
19 Pub. L. No. 108-458, § 3001(g), 118 Stat. 3638 (2004) (requiring Government personnel security  
20 checks to be completed within a certain time frame). Additionally, Congress has not provided any  
21 clear guidelines indicating the speed at which the FBI and USCIS should conduct its adjudications.  
22 Congress has, however, required that USCIS conduct certain criminal and national security background  
23 checks to ensure eligibility for adjustment of status. See 8 U.S.C. §§ 1105(b)(1), 1255(a).

24 Defendants acknowledge that Congress has observed that in most instances, applications for  
25 immigration benefits should not take more than 180 days to adjudicate. 8 U.S.C. § 1571. However,  
26 the statute expresses a "sense of Congress," and is not a mandate. Id. The language in § 1571 is  
27 merely precatory, and does not impose a deadline on Defendants. See Wright v. City of Roanoke  
28 Redevelopment and Housing, 479 U.S. 418, 432 (1987) (statute phrased in precatory terms does not

1 create a substantive right); Orkin v. Taylor, 487 F.3d 734, 739 (9th Cir. 2007) (“‘Sense of Congress’  
2 provisions are precatory provisions, which do not in themselves create individual rights, or, for that  
3 matter, any enforceable law.”).

4 Furthermore, the statute was enacted in 2000, prior to the events of September 11, 2001. See  
5 Immigration Services and Infrastructure Improvements Act of 2000, Pub. L. No. 106-313, 114 Stat.  
6 1251 (enacted Oct. 17, 2000). Accordingly, it no longer provides a meaningful standard against which  
7 the Court can measure the delay at issue in this case. The events of September 11, 2001 marked a  
8 dramatic shift in issues involving national security. Courts have taken note of this change:

9 It is well known that since September of 2001, the FBI’s resources have been  
10 sorely taxed by the demands that have been made on it by the Administration. Legitimate national security concerns, intensified by the sophistication of some  
11 of the threats to the lives of people in this country, have forced federal agencies  
12 to be considerably more careful and thorough in their investigations than they  
were in the past. In short, there was a lot more work for the FBI to do and it had  
to be done a lot more carefully.

13 Razaq v. Poulos, No. C 06-2461 WDB, 2007 WL 61884, at \*12 (N.D. Cal. Jan. 8, 2007).

14 Where there are no statutory guidelines, and in order to establish a “rule of reason,” this Court must  
15 consider the factors that contribute to the backlogs that both the FBI and USCIS face. See, e.g., INS  
16 v. Miranda, 459 U.S. 14, 18 (1982) (“Both the number of the applications received by the INS and the  
17 need to investigate their validity may make it difficult for the agency to process an application as  
18 promptly as may be desirable”). In making a request for immigration benefits, “aliens only have those  
19 statutory rights granted by Congress,” Marincas v. Lewis, 92 F.3d 195, 203 (3d Cir. 1996), and no  
20 federal statute or regulation prescribes a hard-and-fast deadline for acting upon immigration  
21 applications, such as the ones in this case, submitted to the USCIS. See Cordoba v. McElroy, 78 F.  
22 Supp. 2d 240, 244 (S.D.N.Y. 2000).

23 As discussed in Eldeeb, the FBI name check is a complex process. Eldeeb, 2007 WL 2209231, at  
24 \*2. It involves a check of a variety of sources, and although most name checks are resolved in a matter  
25 of hours, approximately 32 percent require additional, manual review. Id. at \*2. Of those remaining  
26 checks, 22 percent are returned within two months. Id. The FBI processes name checks  
27 chronologically, based on the date the name check is submitted. Id.

28 Before September 11, 2001, the FBI processed approximately 2.5 million name checks per year,



checking only the “main” files. Id. at \*3. In Fiscal Year 2006, the FBI processed over 3.4 million name checks. Id. In addition, the FBI began checking “reference” files. Id. This expansion of the name check procedures prompted USCIS, in December 2002 and January 2003, to resubmit 2.7 million name check requests, for those with pending applications for immigration benefits. Id. at \*4. The FBI is currently still working to resolve 440,000 of these resubmitted name checks; because the FBI processes name checks chronologically, the processing of regular name checks has been delayed. Id. Name checks that exceed the two month window require personal attention of the processing agent. Id. at \*5. The FBI currently processes approximately 340,000 name checks per year by hand. Id. Thus, it is evident that there are substantial factors contributing to the backlog.

The FBI is seeking a variety of methods to improve the name check process and reduce delays. Cannon Decl. ¶ 29. For the short-term, the FBI is hiring contract employees and filling vacant positions to help process pending name checks. Cannon Decl. ¶¶ 29 -32. Additionally, the FBI is streamlining new employee training to reduce the time needed before new employees can begin to work on pending name check cases. Id. In the long-term, the FBI is continuing to develop faster and more effective processes to reduce delays including: (1) an electronic repository for name check results, (2) scanning of paper files to make process more automated, (3) investing in analytical identification software, (4) creation of a Central Repository Complex to store files, and (5) an examination of the name check fee structure. Cannon Decl. ¶¶ 33 - 36.

c. The Impact of the Delay is Minimal in Comparison with the National Interest in Complete and Thorough Background Checks

The third TRAC factor is the delay’s impact on human health, welfare, and economic harm to Plaintiffs. This factor’s analysis overlaps with the analysis of the fifth TRAC factor, the nature and extent of the interests prejudiced by the delay. TRAC, 750 F.2d at 80; Liberty Fund, 394 F. Supp. 2d at 118. Plaintiffs may be inconvenienced by the delay in adjudication, but this individual interest cannot outweigh Defendants’ interests in fully and accurately completing each name check. Security background checks for individuals seeking immigration benefits is a key component to our nation’s national security. See The 9/11 Commission Report, 2004 WL 1634382 at 352 (July 22, 2004) (finding that, “had the immigration system set a higher bar for determining whether individuals are

1 who or what they claim to be....it could have potentially have excluded, removed, or come into further  
 2 contact with several hijackers who did not appear to meet the terms for admitting short-term visitors.”).

3 In most cases, the adverse impact caused by the delay is not substantial. Applicants for adjustment  
 4 of status who have pending applications may apply for and obtain employment authorization for the  
 5 entire time the application is pending. Additionally, most applicants may also apply for and receive  
 6 advance parole to enable them to travel abroad during the pendency of their application. Heinauer  
 7 Decl. ¶ 23. Even when a more substantial impact is felt by an applicant, this impact, “is unlikely to  
 8 rise to the level that would significantly change the Court’s assessment of the unreasonableness of the  
 9 delay in light of the importance of the agency’s competing priorities.” Liberty Fund, 394 F. Supp. 2d  
 10 at 118. As the highest of priorities, “our national security requires that caution and thoroughness in  
 11 these matters not be sacrificed for the sake of expediency.” Safadi v. Howard, 466 F. Supp. 2d 696,  
 12 701 (E.D. Va. 2006). Although a delay in processing may have a negative impact, “nevertheless, in  
 13 this post-9/11 context, agencies must have the freedom to carefully and thoroughly investigate these  
 14 applications without judicial interference in their priorities.” Patil v. Mueller, et al., No. C 07cv71  
 15 JCC, 2007 WL 1302752 at \*2 (E.D. Va. Apr. 30, 2007) (holding that the Court had no jurisdiction to  
 16 issue a writ of mandamus due to legal and policy considerations). Thus, when balancing the agencies’  
 17 interests in defending against threats to national security against the Plaintiffs’ interest in adjudication,  
 18 the interests of the nation must prevail.

19 d. The Effect of Expedition Would Intrude on Agency Discretion and  
 20 Prejudice Other “First In Line” Applicants

21 The court in Sze v. INS, No. C 97-0569 SC, 1997 WL 446236, at \*8 (N.D. Cal. Jul. 24, 1997),  
 22 which applied the TRAC test to a similar complained-of delay in the immigration context, found the  
 23 fourth factor to be the most persuasive. Id. at \*8. The court, in refusing to grant relief under the APA,  
 24 held that “the reasonableness of administrative delays must be judged in light of the resources available  
 25 to the agency.” Id. The court also recognized that by granting relief, it “would, at best, reorder the  
 26 queue of applications, thereby leading to little net benefit.” Id.; see also Liberty Fund, 394 F. Supp.  
 27 2d at 117 (deferring to agency’s decision on how to handle competing applications for permanent labor  
 28 certifications).

1 In Liberty Fund, the court refused to grant mandamus relief where it was requested solely due to  
2 the length of the delay in processing alien labor certifications. 394 F. Supp. 2d at 115. Applying the  
3 TRAC factors, the court held that without a statutory timetable governing agency action, the TRAC  
4 factor, "that weighs most heavily under the circumstances of the case is the fourth factor - the effect  
5 of granting relief on the agency's competing priorities." Id. at 116. The court reasoned that the  
6 agency's "first in, first out processing" was deserving of deference because any grant of relief to  
7 petitioners would result in no net gain - petitioners would move to the front of the queue at the expense  
8 of other similarly situated applicants. After examining the agency's priorities, growing workload, and  
9 good faith efforts to alleviate the delays, the court concluded that mandamus relief was not warranted.  
10 Id. at 119.

11 Just as in Liberty Fund, Plaintiffs' argument of unreasonable delay in this case must also fail.  
12 Plaintiffs ask this Court to find that USCIS has not adjudicated their I-485 applications in a reasonable  
13 period of time. Plaintiffs' legal arguments under Sections 555(b) and 706(1) of the APA fail because  
14 adjudication has not been unreasonably delayed. Contrary to Plaintiffs' pleadings, the existence of  
15 administrative delays does not mean that such delays are unreasonable. Courts have noted that "the  
16 reasonableness of such delays must be judged in light of the resources that Congress has supplied to  
17 the agency for the exercise of its functions, as well as the impact of the delays on the applicants'  
18 interests." Fraga v. Smith, 607 F. Supp. 517, 521 (D. Or. 1985) (citing Wright v. Califano, 587 F.2d  
19 345, 353 (7th Cir. 1978)). Indeed, "[t]he passage of time alone is rarely enough to justify a court's  
20 intervention in the administrative process." Fraga, 607 F. Supp. at 521.

21 Similarly, the effect of expediting delayed agency action under the fourth TRAC factor would  
22 unquestionably impinge upon agency activities and responsibilities of a higher priority. Such an order  
23 would intrude on the agency's discretion and ability to fulfill its highest priority of safeguarding the  
24 nation. See Boim v. Quranic Literacy Institute, 291 F.3d 1000, 1027 (7th Cir. 2002) ("the  
25 government's interest in preventing terrorism is not only important but paramount"); see also Walters  
26 v. Reno, 145 F.3d 1032, 1043 (9th Cir. 1998) ("The Government's interests in the administration of  
27 its immigration laws and in preventing [immigration related] document fraud are likewise  
28 considerable.")

1 Delays in the processing of FBI name checks arise for a variety of reasons. First, USCIS is not the  
2 only agency that engages in the FBI name check program. Notably, the FBI and USCIS processes' do  
3 not occur in vacuums. Any requirement that the FBI or USCIS process Plaintiffs' name check or  
4 applications within a particular time limit will have the unfortunate side effect of slowing the  
5 processing for other applicants who are also awaiting action on their applications for immigration  
6 benefits.

7 The requests generally processed out-of-order are cases expedited by USCIS for specific health,  
8 welfare, or economic reasons. Absent these compelling reasons, moving some individuals to the front  
9 of the queue would simply move that group ahead of others who also had been waiting, resulting in  
10 no net gain in processing. See In re Barr Lab., 930 F.2d at 75; Mashpee Wampanoag Tribal Council,  
11 Inc. v. Norton, 336 F.3d 1094, 1101 (D.C. Cir. 2003). Furthermore, ordering Plaintiffs' case to the  
12 front of the line sets the precedent that the more litigious applicants are most likely to move to the top  
13 of the pile at the expense of other applicants that have waited even longer, but may not have the  
14 resources to file suit. Manzoor v. Chertoff, 472 F. Supp 2d 801, 809 (E.D. Va. 2007); see also Yan,  
15 2007 WL 1521732 at \*7 (holding that a grant of review of petitioner's claims would only, "encourage  
16 other applicants to file suit to receive expedited treatment rather than wait their turn in line.").

17 Moreover, the courts have been cautioned against "engrafting their own notions of proper  
18 procedures upon agencies entrusted with substantive functions by Congress." Vermont Yankee  
19 Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 525 (1978). Here,  
20 where "there are no allegations of bad faith, a dilatory attitude, or a lack of evenhandedness on the part  
21 of the agency, the reasonableness of the delays in terms of the legislatively imposed 'reasonable  
22 dispatch' duty must be judged in light of the resources that Congress has supplied, as well as the  
23 impact of the delays on the applicants' interests." Wright, 587 F.2d at 353. The complexity of agency  
24 investigations, as well as the extent that the individual applicants contributed to delays, also enter into  
25 a court's deliberations. See Saleh v. Ridge, 367 F. Supp. 2d 508, 512 (S.D.N.Y. 2005). An agency's  
26 good faith efforts to address delays militate against a finding of unreasonableness. See Wright, 587  
27 F.2d at 345.

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e. The Agencies are Exercising Every Effort to Address the Delay

The sixth and last TRAC factor provides that a court need not find impropriety to hold that an agency action is unreasonably delayed. Conversely, “the good faith of the agency in addressing the delay weighs against mandamus.” Liberty Fund, 394 F. Supp. 2d at 120. Here, the delay is due to the pendency of Plaintiffs’ FBI name check. Heinauer Decl. ¶ 19. As discussed above, the FBI is processing the name checks to the best of its ability, and USCIS is monitoring the case to ensure that once the name check is complete, USCIS can complete adjudication. Thus, balancing the TRAC factors demonstrates the reasonableness of the Government’s actions.

In addition, Plaintiffs have failed to show that USCIS will refuse to adjudicate their applications once the FBI completes the requisite name check. See Saleh, 367 F. Supp. 2d at 513; see also Eldeeb, 2007 WL 209231, at \*17 (finding that the plaintiff had failed to show that USCIS was refusing to act on his application). On the contrary, the FBI and USCIS are taking active steps towards completing the background checks for adjudication of their applications. Specifically, USCIS is making every effort to complete adjudication as soon as the name check is completed. Heinauer Decl. ¶ 19.

Many courts have refused to grant relief under the APA, even when naturalization or other immigration applications were pending for significant time periods. See Saleh, 367 F. Supp. 2d at 513 (finding five-year delay not in violation of APA in part in light of volume of applications); Espin v. Gantner, 381 F. Supp. 2d 261, 266 (S.D.N.Y. 2005) (over three-year delay not unreasonable because of government’s limited resources and substantial caseload); Alkenani v. Barrows, 356 F. Supp. 2d 652, 656-57 (N.D. Tex. 2005) (no unreasonable delay found in naturalization context because of need to wait for completion of FBI investigation). Just as in these cases, Plaintiffs in the present case insists that this Court find an unreasonable delay based solely on the amount of time passed since receipt of their applications. However, the law requires a more in-depth analysis for mandamus relief under the APA. A review of the six TRAC factors shows that Defendants have not unreasonably delayed actions pertaining to Plaintiffs’ adjustment of status applications.

C. MANDAMUS IS NOT AVAILABLE BECAUSE PLAINTIFFS’ CLAIM IS NOT CLEAR AND CERTAIN

Mandamus is reserved for those situations in which the Plaintiffs’ claim is clear and certain.



1 Kildare, 325 F.3d at 1078. Here, because Plaintiffs have failed to establish that action on their  
2 applications have been unreasonably delayed, and they have failed to show that their claim is so clear  
3 and certain that mandamus is justified. Furthermore, USCIS has exercised its discretion in determining  
4 which name checks should be expedited. Plaintiffs' case meets none of these criteria. Accordingly,  
5 the Court should decline to issue a writ of mandamus.

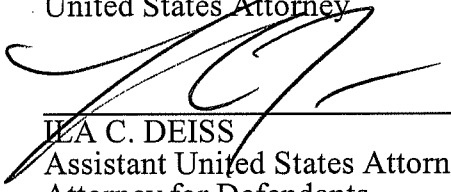
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7 **V. CONCLUSION**

8 For the foregoing reasons, the Government respectfully asks the Court to dismiss Defendants  
9 Heinauer, Gonzalez, Mueller and Mukasey, and grant the remaining Defendants' motion for summary  
10 judgment as a matter of law.

11 Dated: November 30, 2007

Respectfully submitted,

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